A

ALAGUTHVEN SELVARAJAH

v.

TIMBALAN MENTERI KESELAMATAN DALAM NEGERI, MALAYSIA & ORS

B

HIGH COURT MALAYA, ALOR STAR
MOHD SOFIAN ABD RAZAK J
[CRIMINAL APPLICATION NO: 44-06-2007]
5 JUNE 2008

C

PREVENTIVE DETENTION: *Detention order - Habeas corpus - Application for - Whether r. 3(1) of the Public Order and Prevention of Crime (Procedure) Rules 1972 complied with - Whether there was sufficient explanation for delay of commencement date - Whether detention*
D *order could take effect on date subsequent to date on which it was made - Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1) - Whether complied with - Whether decision made by Yang Di Pertuan Agong made within reasonable time - Federal Constitution, art. 151(1)(b) - Whether applicant prejudiced - Whether advisory board*
E *carried out its duty within prescribed time - Whether in accordance with the law*

This was an application (encl. 1) by the applicant for a writ of *habeas corpus ad subjiciendum*. The applicant was detained by a
F detention order dated 4 September 2006 issued by the Honourable Deputy Minister of Home Affairs and made pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). The detention order was for a period of two years commencing 5 September 2006. The
G applicant advanced three grounds to challenge the detention order: (i) that there was procedural non-compliance with r. 3(1) of the Public Order and Prevention of Crime (Procedure) Rules 1972 with regard to procedure making representations; (ii) that there was procedural non-compliance with s. 4(1) of the Ordinance with
H regard to whether the detention order could be made to take effect on a date subsequent to the date on which it was made and (iii) that there was procedural non-compliance with regard to the undated second affidavit-in-reply by the Secretary to the advisory board and the absence of proof that the board's
I recommendations were sent to the Yang Di Pertuan Agong for His

Majesty's consideration within the three month period. After perusing the written and oral submissions by both parties, the court dismissed the applicant's application (encl. 2) and hence this appeal.

Held (dismissing application for *habeas corpus*):

(1) The officer in charge had served three copies of Form 1 on the applicant on 6 September 2006, the date the applicant was brought to the detention centre. The applicant had returned a copy of Form 1 filled up, signed and sent to the advisory board who received it on 18 September 2006 which was within the 14 days of it being handed over to the officer in charge. The terminology ' as soon as practicable' denotes a situation when the 'condition permits' – that is upon the arrival of the applicant, the officer in charge shall inform him of his right to make representation against the detention order within the time and manner prescribed. If there were delays in handing over the Form 1 to the applicant, which this court found otherwise, such a delay did not go to the root of the matter and it was not mandatory but rather directory in nature. The second respondent herein had complied with r. 3(1) of the 1972 Rules. There was no basis in the averment made by the applicant on this issue and forthwith it should be dismissed. (paras 20 & 21)

(2) There was no indication in s. 4(1) of the Ordinance, expressly or by implication, that the date of commencement of the detention order must be the same as the date of making it *(Kumaran Suppiah)*. The Deputy Minister had provided sufficient explanation for the delay of the commencement date and those explanations were available at the time of the making of the detention order. The time within which the detention order was to take effect *ie*, on 5 September 2006 was the same or close as possible to the date of making the detention order ie on 4 September 2006 and which was done at all convenient speed. There was no procedural non-compliance on this issue and it was hereby forthwith dismissed. (para 36)

(3) The respondents had complied with all the relevant provisions of the 1972 Rules, s. (1) of the Ordinance and art. 151 of the Federal Constitution. The three months period commenced on 18 September 2006 being the date of receipt of the

applicant's representations by the advisory board. The date 12 December 2006 was the date the advisory board's recommendations were submitted to the Yang Di Pertuan Agong which was within the three months period. The fact that the decision by the Yang Di Pertuan Agong confirming the detention order on 16 January 2007 being more than one month after receipt thereof, did not in any way affect the detention order. Article 151(1)(b) of the Constitution does not stipulate the time frame within which the Yang Di Pertuan Agong has to make His Majesty's decision. The decision made by the Yang Di Pertuan Agong was made within the reasonable time in the circumstances of the case. The applicant had not suffered prejudice as a result. (paras 50, 51, 55, 56 & 60)

(4) The advisory board had carried out its duty within the prescribed time and the decision to confirm the detention order by the Yang Di Pertuan Agong after one month from date of receipt of the recommendations did not in any way render the continued detention after the three months period to be unlawful and was thus in accordance with the law. (para 63)

Case(s) referred to:

Jayaraman Arumugam v. The Minister for Home Affairs, Malaysia & Anor [1989] 2 CLJ 605; [1989] 1 CLJ (Rep) 629 ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri, (Minister of Home Affairs) Malaysia [1969] 1 LNS 65 ***(refd)***

Kumaran Suppiah v. Dato' Noh Hj Omar & Anor [2006] 4 CLJ 675 FC ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 4 CLJ 687 ***(refd)***

Rajoo Ramasamy v. Inspector-General of Police & Ors [1990] 1 CLJ 554; [1990] 3 CLJ (Rep) 18 ***(refd)***

Ramu Kuppusamy lwn. Timbalan Menteri Dalam Negeri, Malaysia Dan Yang Lain [2006] 4 CLJ 752 HC ***(dist)***

Re Tan Boon Liat & Anor v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia [1977] 1 LNS 110 ***(refd)***

Thamilvanen Kandasamy v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2007] 8 CLJ 717 HC ***(refd)***

Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong Beng Chuan [2006] 4 CLJ 703 FC ***(refd)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), 10(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)
Federal Constitution, arts. 5(1), 6(1), 151(1)(b)
Interpretation Acts 1948 and 1967, ss. 45, 109
Public Order and Prevention of Crime (Procedure) Rules 1972, rr. 3(1), (2), (3), (4), (5), (6), (7), 6
Rules of the High Court 1980, O. 41 r. 4

For the applicant - S Sundarajan; M/s Sundarajan & Assoc
For the respondents - Najib Zakaria SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Sofian Abd Razak J:

[1] This is an application (encl. 1) by Alaguthven a/l Selvarajah (the applicant) for a writ of *habeas corpus ad subjiciendum*. The applicant is presently detained by a detention order dated 4 September 2006 issued by the Honourable Deputy Minister of Home Affairs and made pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). The detention order is for a period of two (2) years commencing 5 September 2006.

[2] The applicant advanced three grounds to challenge the detention order which will be dealt with *in seriatim*:

1) That there was procedural non-compliance with rr. 3(1) of the Public Order and Prevention of Crime (Procedure) Rules 1972 (the 1972 Rules) with regard to procedure for making representations.

2) That there was procedural non-compliance with s. 4(1) of the Ordinance with regard to whether the detention order could be made to take effect on a date subsequent to the date on which it was made.

3) That there was procedural non-compliance with regard to the undated second affidavit-in-reply by Suhaila binti Ibrahim, the Secretary to the advisory board and the absence of proof that the board's recommendations were sent to the Yang di-Pertuan Agong for His Majesty's consideration within the three month period.

[3] The court on 23 March 2008 after perusing the written and hearing oral submissions by both parties, dismissed the applicant's application (encl. 2) and hence this appeal.

[4] The applicant in his affidavit in support of the application (encl. 2) had given three reasons upon which he challenges the said order on procedural non-compliance. The Federal Court in the *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 Abdul Hamid Mohamad FCJ (now CJ of Malaysia) delivering the judgment of the court at pp. 921-922 had this to say:

> The Ordinance was amended by the Emergency (Public Order and Prevention of Crime) (Amendment) Act, 1989 (Act A740) which came into force on 24th August 1989. (Similar amendments were also made to the ISA 1960 and DD (SPM) Act, 1985 by Act A739 and Act 738, respectively) Act A740 *inter alia*, inserted *new ss. 7C and 7D into the Ordinance, which clearly restricted challenges to detention orders made by the Minister under s. 4(1) of the Ordinance to grounds of non-compliance with any procedural requirement and nothing else*.

[5] His Lordship further stated that (at pp. 930-931):

> .... In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So in a *habeas corpus* application where the detention order of the Minister made under s. 4(1) of the Ordinance or, for that matter, the equivalent ss. in ISA 1960 and DD(SPM) Act 1985, *the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof.* Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance ...

First Issue

[6] Rule 3(1) stipulates that "when any person is brought to a place of detention in pursuance of a detection order, it shall be the duty of the officer in charge to inform him, as soon as practicable after his arrival, of his right to make representations against the detention order with the time and in the manner hereinafter provided.

[7] It was the contention of the learned counsel for the applicant that when the applicant was brought to the detention centre on 5 September 2006, the applicant was provided with clothing and registration number. Thereafter he was placed in an isolation cell for a week. The purpose for which was to screen the detainee physically. This was to ensure that no prohibited items were smuggled into the cell. The applicant was allegedly taken out of the cell and brought to the record office on 12 September 2006 whereupon he was handed with Form 1 to be duly filled and signed.

[8] Perusing the applicant's affidavit in support (encl. 2), the court finds that the only averment of the said non-compliance is found in paras 15 and 16 respectively. The said paragraphs are reproduced and stated as follows:

> 15. Seterusnya apabila saya dibawa ke Pusat Pemulihan Akhlak Simpang Renggam, Johor, saya tidak diserahkan dengan borang-borang yang mencukupi yang sepatutnya diserahkan kepada saya di bawah Kaedah-Kaedah Ketenteraman Awam dan Mencegah Jenayah 1972 (Acara) dan ia tidak diserahkan dengan secepat yang mungkin.
>
> 16. Saya mengatakan di sini bahawa keperluan Kaedah-Kaedah Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1972, Kaedah 3(2) tidak dipatuhi.

[9] The learned counsel for the applicant in his submission referred to the affidavit of Suhaila binti Ibrahim, the Secretary to the advisory board (encl. 11) where the Form 1 was exhibited as showing the date upon which it was signed being 12 September 2006. Accordingly, it was further submitted that Form 1 was handed over to the applicant seven days after the applicant was detained at the centre.

[10] It was submitted that Form 1 is only a simple form and it does not require the applicant six days to figure out how to fill up Form 1. Form 1 could have been filled up by the applicant on the very day it was handed over to him and there was no reason for him to have waited until 12 September 2006.

[11] The learned counsel for the applicant argued that since Form 1 was given to the applicant on the day he was taken out of the cell, instead of on the day he arrived at the centre, there has been a procedural non-compliance of r. 3(1).

[12] In support of this contention the learned counsel for the applicant cited the case of *Ramu Kuppusamy lwn. Timbalan Menteri Dalam Negeri, Malaysia Dan Yang lain* [2006] 4 CLJ 752. The brief facts is distinguishable from the facts of the instant case. In *Ramu Kuppusamy*'s case a request by the applicant to the advisory board for an adjournment of the hearing of the representation to enable his counsel to appear was refused by the board. Accordingly, the decision by the learned judge in allowing the application and a writ of *habeas corpus* issued was correctly decided. There was a clear procedural non-compliance of r. 6 of the 1972 Rules in that the detained person shall be entitled to be represented by an advocate.

[13] In reply to the first issue, the learned senior federal counsel for the respondents submitted that not all procedural non-compliance will make the detention order invalid. It all depends on whether the said breach is mandatory or directory in nature and whether it will go to the root of the matter and be of direct relevance to the making of the detention order. Reference was made to the case of *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong Beng Chuan* [2006] 4 CLJ 703 at p. 712 where Augustine Paul FCJ quoted *in extenso* a passage from the case of *Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687 which reads as follows:

> The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649; *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v. Inspector General of Police* [1993] 1 CLJ 373. It has been recognized in these cases that a procedural requirement may be

mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice.

The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee. However it must be observed that the power of the Court to intervene is limited to only matters of compliance with procedural requirements by section 11C(1) of the Act which reads as follows:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. Such procedural requirements can only be ones that will go to the root of the matter and be of direct relevance to the making of the detention order. The section only refers to a question of compliance with procedural requirements without subjecting it to any prejudice having been suffered. The test, therefore, in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, though not decisively, by a consideration of the effect of the statutory provision that has been breached, that is to say, whether it is mandatory or directory in nature.

[14] The learned senior federal counsel for the respondents further referred to the case of *Tan Boon Liat v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia* [1977] 1 LNS 110 where Tun Suffian Hashim LP stated *inter alia* as follows:

I drew a distinction between law and procedure and said in effect that the courts will take a serious view of failure to comply with substantive law but not of failure to comply with procedural law.

[15] The Federal Court in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 1 LNS 65 and *Re Tan Boon Liat (supra)* on the question of whether the detention was in the words of art. 5(1) of the Constitution in accordance with the law held *inter alia* that the failure of the advisory board to carry out its duty within the prescribed time in these cases render the continued detention after the three months period to be unlawful as it could not be said to be in accordance with the law.

[16] Reverting to the instant case, the learned senior federal counsel for the respondents referred to the affidavit of the officer in charge of the detention centre (encl. 7) affirmed on 2 July 2007 by Wan Abdul Rahman in particular paras 5 and 6 respectively which is reproduced and stated as follows:

5. Saya menegaskan bahawa Pemohon telah dibawa masuk ke PPA Simpang Renggam pada 6.9.2006 dan saya telah berjumpa Pemohon pada hari tersebut. Seterusnya pada hari yang sama saya telah memberitahu, menjelaskan, menerangkan dan mengingatkan Pemohon tentang segala hak beliau yang diperuntukkan di bawah Kaedah-Kaedah Ketenteraman Awam & Mencegah Jenayah (Acara) 1972 (selepas ini dirujuk sebagai "Kaedah-Kaedah tersebut") dan Perlembagaan Persekutuan. Selanjutnya saya menerangkan isi kandungan Borang Rayuan Berhubung Perintah Tahanan tersebut (selepas ini disebut sebagai "Borang 1 tersebut") seperti yang diperuntukkan di bawah Kaedah 3(2) Kaedah-Kaedah tersebut. Saya juga menerangkan isi kandungan Perintah Tahanan serta pengataan-pengataan fakta yang atasnya perintah tahanan itu diasaskan sepertimana yang dieksibitkan sebagai "SR-1" dan "SR-2" dalam afidavit Pemohon. Saya sesungguhnya telah menggunakan bahasa Malaysia yang mudah difahami oleh Pemohon dan Pemohon mengakui memahaminya. Saya juga telah menyerahkan 3 salinan Borang 1 tersebut kepada Pemohon bagi tujuan membuat representasi.

6. Saya dengan suci hati mengatakan bahawa adalah tidak ada keperluan undang-undang untuk pihak saya mengemukakan sebarang bukti yang menunjukkan bahawa saya telah berjumpa dan menyerahkan Borang 1 kepada Pemohon pada 6.9.2006. Malah saya dengan tegasnya menyatakan bahawa saya sememangnya telah berjumpa dengan Pemohon pada 6.9.2006 dan

menyerahkan Borang 1. Walau bagaimanpun Pemohon hanya mengisi dan menyerahkan Borang 1 tersebut di hadapan saya pada 12.9.2006. Saya juga sesungguhnya menegaskan bahawa pihak kami tidak mengarahkan Pemohon mengisi Borang 1 tersebut pada 6.9.2006 adalah kerana ingin memberi peluang kepada Pemohon untuk meneliti Borang 1 tersebut serta memikirkan samada Pemohon ingin hadir atau tidak ke persidangan representasi tersebut dan seterusnya Pemohon dapat memilih mana-mana peguambela yang akan mewakili beliau dalam persidangan tersebut. Selanjutnya saya sesungguhnya menyatakan bahawa Pemohon telah hadir di hadapan Lembaga Penasihat dan telah membuat satu representasi yang efektif.

[17] The above averment by Wan Abdul Rahman bin Abdullah is further reaffirmed in his affidavit in reply affirmed on 12 September 2006 (encl. 19) in particular paras 5 and 6 respectively.

[18] In this regard the court in its considered view, and upon perusing paras 15 and 16 of the applicant's affidavit in support (encl. 2) and further affidavit (encl. 14), finds that the applicant did not specifically mention how many copies of Form 1 were handed over to him. In fact if one reads para 15 of encl. 2, an irresistible inference drawn was that Form 1 was served on him but alleged insufficient copies (a fact which the respondents denied). It is important for the applicant to state clearly the number of copies which were given to him.

[19] Rule 3(2) stipulates that "it shall be the duty of the Officer in Charge, when informing any detained person of his right to make representations to provide him with two copies (or, if the detained person states that he intends to engage an advocate to represent him, three copies) of Form 1 in the Schedule."

[20] The court is of the view that from the affidavit evidence, the court concludes that Wan Abdul Rahman bin Abdullah, as the officer in charge had served three copies of Form 1 on the applicant on 6 September 2006, the date the applicant was brought to the detention centre, (see para 8 of encl. 7). He further states that he first explained the contents of Form 1 to the applicant in Bahasa Malaysia (see para 5 of encl. 7) that was easily understood and also took additional precaution of having one Harun bin Musa who was at the material time, the Tamil interpreter at the centre to translate the contents therein. The said Wan Abdul Rahman bin Abdullah further states in para 9 of encl. 7 that the applicant was only ready to fill in and sign Form

A 1 on 12 September 2006, which the applicant did in his presence and with the assistance of Harun bin Musa. It was stated in encl. 7 that the applicant returned a copy of Form 1 duly filled-up, signed and sent to the advisory board. It was received by the board on 18 September 2006 which was within the 14 days of it
B being handed over to the officer in charge. A copy of the Form 1 is exhibited as S1 – 1 to the affidavit of Suhaila binti Ibrahim, the Secretary to the advisory board. The said Form 1 was dated 12 September 2006 and has the name of one Harun bin Musa as the Tamil interpreter together with his signature on the reverse of
C Form 1.

[21] The court is of the view that the terminology 'as soon as practicable' denotes a situation when the 'condition permits' – that is upon the arrival of the applicant, the officer in charge shall
D inform him of his right to make representation against the detention order within the time and in the manner prescribed therein. In this regard, if there were delays in handing over the Form 1 to the applicant, which the court finds otherwise, such a delay does not go to the root of the matter and it was not
E mandatory but rather directory in nature.

[22] In the instant case, the learned senior federal counsel gave the chronology relating to the applicant's representation as follows:

[23] Submission of representation through Form 1 to the advisory
F board on 12 September 2006. On 18 September 2006 the advisory board received the Form 1 from the applicant. On 13 October 2006, the advisory board sent Form 11 to the applicant informing of the date for the hearing of the applicant's representation fixed on 16 November 2006. The hearing fixed on
G 16 November 2006 was adjourned to 28 November 2006 and 6 December 2006 respectively.

[24] On 6 December 2006 the applicant's representation was heard with the presence of his counsel from Messrs. Gunapathi
H Suppiah & Co. On 12 December 2006 the advisory board forwarded the recommendations to the Yang di-Pertuan Agong for His Majesty's consideration and on 16 January 2007, the Yang di-Pertuan Agong confirmed the detention order.

I **[25]** In this regard, the learned senior federal counsel submitted that there has been no procedural non-compliance with regard to the hearing of the applicant's representation.

[26] In *Nagarathinam v. Timbalan Menteri Keselamatan Dalam Negeri & Ors*, an unreported case where the Federal Court held that:

> If there were non-compliance of Rule 3(1), it was only of a directory and not mandatory in nature which will not affect the submission of the applicant's representation to the Advisory Board.

[27] In *Nagarathinam*'s case the issue was the evidence of signature in the endorsement of service Form 1 which was not exhibited in exh. NV1. The applicant in *Nagarathinam*'s case was present and the hearing of the representation was duly held despite the above averment.

[28] In the instant case, the second respondent therefore had complied with r. 3(1) of the 1972 Rules. In the upshot, the court finds no basis in the averment made by the applicant on this issue, and forthwith dismissed it.

Second Issue

[29] Section 4(1) of the Ordinance states as follows:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained or that it is necessary for the suppression of violence of the prevention of crimes in involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years.

[30] On this issue, the learned counsel for the applicant submitted that the commencement of the detention order shall take effect on the date on which it was made. In the instant case, it was not disputed that the detention order is dated 4 September 2006 but the date of commencement of the detention was 5 September 2006 which was therefore subsequent to the date of the detention order. There was a delay of one day. The learned counsel for the applicant cited the Federal Court case of *Kumaran Suppiah v. Dato' Noh Hj. Omar & Anor* [2006] 4 CLJ 675 where such delay has to be explained as it is a constituent part of s. 4(1) of the Ordinance.

[31] The learned counsel for the applicant further stated that the explanation given by the Deputy Minister concerning the delay was most unsatisfactory. Accordingly the applicant was arrested and detained at Bukit Aman for a period of 60 days and on 4 September 2006, a detention order was made under s. 4(1) of the Ordinance. The applicant was only sent to the detention centre on 6 September 2006. The journey from Bukit Aman to Simpang Renggam, Johor would take less than three hours. The applicant could have arrived at the centre the earliest on the evening of 4 September 2006 or the latest the morning of 5 September 2006. The learned counsel for the applicant questioned the delay in serving of the detention order at 5pm resulting the journey to the detention centre to commence the following date.

[32] Reference was made to the case of *Thamilvanen Kandasamy v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2007] 8 CLJ 717 where the brief facts were *inter alia* there was a three day delay in the date of commencement of the detention order from the date on which it was made. The court in allowing the applicant's application and a writ of *habeas corpus* issued held at p. 717:

> The several matters deposed to by the Minister therefore do not afford an explanation as to why the date of the detention order differs from that of the commencement of the order. Moreover, these statements did not comprise explanations that were in existence or available to the Minister at the time when the detention order was made, but instead appeared to be reasons put forward subsequently to explain the gap in the dates. As a consequence, there had been non-compliance with a procedural requirement relating directly to the making of the detention order.

[33] In his rebuttal submission, the learned senior federal counsel for the respondent referred to the affidavit of the Deputy Minister of Internal Security affirmed on 2 July 2007 in gist was almost identical to the affidavit deposed to in the case of *Thamilvanen Kandasamy (supra)*, briefly the Deputy Minister in his affidavit in reply (encl. 4) did depose to certain facts which he considered as explanations for the delay of one day namely:

i) That Deputy Minister was advised that at the material time of signing the detention order on 4 September 2006, the position of law was that he was under no legal obligation when exercising his powers under s. 4(1) of the Ordinance to ensure that the date of the detention order shall correspond with the commencement of the detention.

ii) The date of the detection order and the commencement of the detention had to commence before the expiry of the detention by the police under s. 3(3) of the Ordinance.

iii) The Deputy Minister explained that the gap of one day between the signing of the detention order and date of commencement of the detention was done at all convenient speed taking into account the time the police took to complete the investigation (see para 8).

[34] The learned senior federal counsel in reference to the case of *Kumaran Suppiah (supra)* submitted that reading the language in s. 4(1) of the Ordinance, there is no indication, expressly or by implication, that the date of commencement of the detention order must be the same as the date of making it and quoted extensively from the passage of the said case which is as follows:

> [4] In our view the language of s. 4(1) of the Ordinance is clear in its intent and purport. In substance it states that when the Minister is satisfied of the existence of the conditions enumerated therein he shall make a detention order directing that the person be detained for any period not exceeding two years. There is no indication, expressly or by implication, that the date of commencement of the detention order must be the same as the date of making it. The section is silent on this requirement as observed by the (then) Supreme Court in *Tan Hoon Seng v. Minister for Home Affairs, Malaysia & Anor* [1990] 1 CLJ 423; [1990] 1 CLJ (Rep) 271. It is a rule of construction that where the terms of an enactment are clear, precise and unambiguous it must be applied and enforced according to its plain meaning and it is not the function of the court to speculate as to what might have been in the mind of the enacting authority as it may appear to the court from the preamble or otherwise (see *Badri Prasad v. Ram Narain Singh* AIR [1939] All 157).
>
> [5] The fact that s. 4(1) of the Ordinance is silent with regard to the time within which the detention order must be made to take effect does not mean that the Minister has a complete discretion in determining the date. Where no time has been prescribed for the doing of an act in a statutory provision it must be read with s. 54(2) of the Interpretation Act 1967 ("s. 54(2)") which reads as follows:
>
> > Where no time is proscribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.

A In cases such as *Tai Choi Yu v. Government of Malaysia* [1994] 2 CLJ 174 and *Ex parte Austco Pty Ltd* [1985] 2 QDR 1 it was observed that what will be "all convenient speed" will depend upon the facts and peculiar circumstances of each case. As s. 4(1) of the Ordinance read with s. 54(2) deals with preventive B detention it must be strictly construed. *Thus the requirement as to the time within which a detention order must be made to take effect must be the same or as close as possible to the date of making of the detention order.*

[35] With respect, the court is unable to agree with the views C expressed by the learned judicial commissioner in the case of *Thamilvanen Kandasamy (supra)* on this issue. I think the question one needs to ask here is what is the nature of the explanation that is required and whether the explanation given by the Deputy Minister had satisfied the nature of the so called explanation D required. In my view the simple approach to take is for the Deputy Minister to explain the differential between the commencement date and the date he made the detention order.

[36] In the instant case, the Deputy Minister had provided E sufficient explanations for the delay of the commencement date and those explanations were available at the time of the making of the detention order. The court also finds that the time within which the detention order is to take effect ie, on 5 September 2006 is the same or close as possible to the date of making the F detention order ie, on 4 September 2006 and which was done at all convenient speed.

[37] The court is of the further view that the decision in the case of *Thamilvanen Kandasamy (supra)* cannot stand in view of the decision in two unreported Federal Court cases namely; *Er Soon* G *Hua v. Timbalan Menteri Keselamatan Dalam Negeri & 3 Others* (Rayuan Jenayah No: 5-29-2007) and *Dato' Mohd Johari bin Baharum & 2 Others v. Tai Hun Chean* where the Federal Court on the question of delay of six days and two days respectively, accepted the explanation furnished by the Deputy Minister.

H

[38] Based on the above stated reasons, the court finds that there are no procedural non-compliance on this issue and hereby forthwith dismissed it.

I

Third Issue

[39] The learned counsel for the applicant submitted that in so far as affidavit-in-reply (encl. 11) of Suhaila binti Ibrahim, the Secretary to the Advisory Board affirmed on 20 July 2007 is concerned, there was no evidence that on 12 December 2006, the advisory board after having considered the applicant's representation had made recommendations to the Yang di-Pertuan Agong. Consequently, in the absence of any proof of the same, the averment made by the said deponent were just bare assertions without cogent proof. The learned counsel for the applicant further submitted that the Yang di-Pertuan Agong after considering the recommendations made by the advisory board had confirmed the detention order on 16 January 2007 which was more than one month from the date the advisory board forwarding the said recommendations, which gave rise to ambiguity whether the recommendations to the Yang di-Pertuan Agong was made within the three months period and thus contrary to art. 151 of the Constitution.

[40] The learned counsel for the applicant also objected to the use of the second affidavit-in-reply affirmed by Suhaila binti Ibrahim (encl. 20) which was undated and defective. The court should not allow it to be used in reply to the applicant's further affidavit (encl. 14).

[41] The learned senior federal counsel for the respondent in rebuttal submission with regard to the undated affidavit-in-reply, argued that it was not a substantive defect as the deponent had signed and the commissioner for oath had witnessed the attestation; prior to its filing in court. He further submitted that under O. 41 r. 4 of the Rules of the High Court 1980, (hereinafter called 'RHC') the said defective affidavit could be used in evidence with the leave of the court.

[42] Order 41 r. 4 RHC states that:

> An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

[43] The learned senior federal counsel in his alternative submission argued that if the court is minded not to allow the use of encl. 20, he relied on the earlier affidavit-in-reply by the deponent (encl. 11) to rebut the averment in the applicant's further affidavit (encl. 14). The contents in encl. 20, according to him were repetitions of what had been stated in encl. 11.

[44] The court after hearing submissions by both parties on this issue refused to exercise its discretion in granting leave to use the undated second affidavit-in-reply (encl. 20) of the deponent.

[45] The court then proceeded to hear submissions by both parties on the substantive issue of whether there was proof that the board's recommendation were sent to the Yang di-Pertuan Agong pursuant to s. 6(1) of the Ordinance and art. 151 of the Constitution.

[46] It is perhaps necessary at this juncture to reproduce the exact wordings of s. 6(1) of the Ordinance and art. 151 of the Constitution for easier understanding.

[47] Section 6 of the Ordinance reads as follows:

> 6(1) Whenever any person has made any representations under s. 5(1) to an Advisory Board, the Advisory Board, shall within three months of the date on which such person was detained, consider such representations and make recommendations thereon to the Yang di-Pertuan Agong.
>
> (2) Upon considering the recommendations of the Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan Agong thereon shall, subject to the provisions of s. 7, be, final, and shall not be called into question in any Court.

[48] Article 151(1) of the Constitution provides that:

> 151(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
>
> (b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.

[49] The learned senior federal counsel reiterated that based on the chronology adumbrated earlier, the applicant's representation and the hearing thereof was duly held in compliance with rr. 3(1) (2), (3), (4), (5), (6) and (7) of the 1972 Rules, s. 6(1) of the Ordinance and art. 151 of the Constitution.

[50] On this issue, the court after perusing the affidavit evidence by the respondents was of the considered view, that the respondents had complied with all the relevant provisions of the 1972 Rules, s. 6(1) of the Ordinance and art. 151 of the Constitution.

[51] The court upon reading the wordings of s. 6(1) of the Ordinance, is of the view that the advisory board shall within three months from the date of the detention order, do two things, namely, (a) consider the representation which the board has done and decision made on 6 December 2006 and (b) make recommendations thereon to the Yang di-Pertuan Agong which the board has done by forwarding the recommendations on 12 December 2006.

[52] It is also the view of the court that the two things mentioned above must be done within the three months period.

[53] Likewise, the same finding also applies to Art 151 (1)(b) of the Constitution in that the continued detention of the applicant was done after the Yang di-Pertuan Agong had considered the recommendations thereon within the three months period.

[54] The provisions of s. 6(1) of he Ordinance and art. 151(1)(b) of the Constitution only provides for the procedure relating to representations commencing on the date of receipt by the advisory board and thereafter the submission of the board's recommendations to the Yang di-Pertuan Agong.

[55] In the instant case, the three months period commenced on 18 September 2006 being the date of receipt of the applicant's representations by the advisory board. The date 12 December 2006 being the date the advisory board's recommendations were submitted to the Yang di-Pertuan Agong which was within the three months period.

[56] The fact that the decision by the Yang di-Pertuan Agong confirming the detention order on 16 January 2007 being more than one month after receipt thereof, does not in anyway affect the detention order. Article 151(1)(b) of the Constitution does not stipulate the time frame within which the Yang di-Pertuan Agong has to make His Majesty's decision. All it says is that the board's recommendations must be received within three months and there is no requirement that proof of service of board's recommendations to the Yang di-Pertuan Agong has to be exhibited.

[57] In *Rajoo Ramasamy v. Inspector-General of Police & Ors.* [1990] 1 CLJ 554; [1990] 3 CLJ (Rep) 18; where the facts are distinguishable with the facts of the instant case, in that the applicant was detained under a detention order of the Minister of Home Affairs pursuant to the powers conferred upon him by s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. Section 10(1) of the Act is in *pari materia*, but *mutatis mutandis,* with art. 151(1)(b) of the Constitution. In this case, the High Court held that by virtue of ss. 45 and 109 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised - 1989) the Yang di-Pertuan Agong had pursuant to art. 151(1)(b), the power to grant an extension within which the advisory board had to consider the representations by the applicant and make the recommendations thereon. The issue before the High Court was whether the Yang di-Pertuan Agong has the power to extend the three month period limited by art. 151(1)(b) upon application made by the advisory board to His Majesty after expiry of such period. The court held that if there was no such power then decision confirming the detention order would be *ultra vires* and the court can correct it notwithstanding s. 10(2) of the Act which provides that such decision shall be final and shall not be called into question in any court, (see *re Tan Boon Liat (supra)*).

[58] The High Court decision in *Rajoo Ramasamy*'s case was reversed by the Supreme Court which held that the injunction contained in art. 151(1)(b) of the Constitution which expressly provides that no citizen shall continue to be detained unless the advisory board has considered the representations and has made recommendations to the Yang di-Pertuan Agong within three months of receiving the representations. The exception is only where there is an application for extension of time and the court was of the view that reading the art. 151(1)(b) as a whole, it is implicit that if any extension is to be granted it should be granted before the expiry of the three month period.

[59] The issue in the instant case is that the submission of the recommendations by the advisory board to the Yang di-Pertuan Agong was made within the three month period but His Majesty's decision confirming the detention order was made after the expiry of the three months. Whether this was allowed in the context of art. 151(1)(b) of the Constitution.

[60] From the facts of the instant case, the court is of the view that the decision made by the Yang di-Pertuan Agong on 16 January 2007 was made within the reasonable time in the circumstances of the case and the decision in *Rajoo Ramasamy*'s case does not apply to the facts of the instant case as it concerns an injunction found in art. 151(1)(b) that the application for extension of time to submit the recommendations to the Yang di-Pertuan Agong has to be made before the expiry of the three months period. In the case before the court, the recommendations to the Yang di-Pertuan Agong was made within the three months period. It was only His Majesty's decision that was made after the expiry of the three months period. Since art. 151(1)(b) is silent when the decision by the Yang di-Pertuan Agong should be made, by implication it should be within reasonable time. In any event the court fails to see what prejudice the applicant has suffered as a result (see *Jayaraman a/l Arumugam v. The Minister of Home Affairs* [1989] 2 CLJ 605; [1989] 1 CLJ (Rep) 629.

[61] The court is of the further view that if the condition precedent as envisaged in s. 6(1) of the Ordinance, had been complied with and under s. 6(2) of the Ordinance, every decision of the Yang di-Pertuan Agong thereon shall, subject to the provision of s. 7, be, final and shall not be called into question in any court.

[62] In *Karam Singh* and *Tan Boon Liat (supra)*, the court was of the view that the condition precedent before the appellants could be further detained beyond the three months, that the board must have made recommendations that their representations has not been satisfied and held that the continued detention after that period was therefore unlawful.

[63] In conclusion, based on the reasons as stated above, the court finds that the advisory board has carried out its duty within the prescribed time and the decision to confirm the detention order by the Yang di-Pertuan Agong after one month from date

of receipt of the recommendations does not in any way render the continued detention after the three months period to be unlawful and thus in accordance with law.

[64] In all the circumstances, the application for *habeas corpus* is dismissed.